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No. 95-465

In the Supreme Court of the United States

OCTOBER TERM, 1995

LAGUNA GATUNA, INC., PETITIONER

v.

CAROL M. BROWNER, ADMINISTRATOR,
ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a compliance order issued by the Environmental Protection Agency (EPA) under Section 309(a)(3) of the Clean Water Act, 33 U.S.C. 1319(a)(3), is subject to judicial review.

2. Whether Congress's preclusion of judicial review of EPA compliance orders violates due process.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-7) is reported at 58 F.3d 564. The order of the district court (Pet. App. 8-9) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 20, 1995. The petition for a writ of certiorari was filed on September 18, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Clean Water Act (CWA), 33 U.S.C. 1251 *et seq.*, was enacted "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." To that end, Section 301(a) of the Act, 33 U.S.C. 1311(a), prohibits the "discharge of any pollutant" except in accordance with the Act's specific requirements. The Act defines "discharge of a pollutant" to mean "any addition of any pollutant to navigable waters," 33 U.S.C. 1362(12), and defines "navigable waters" as "the waters of the United States, including the territorial seas," 33 U.S.C. 1362(7). Regulations issued by the Administrator of the Environmental Protection Agency (the EPA), in turn, define "waters of the United States" to include, among other things, "waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, 'wetlands,' sloughs, prairie potholes, wet meadows, *playa lakes*, or natural ponds the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters * * * [w]hich are used or could be used for industrial purposes by industries in interstate commerce." 40 C.F.R. 122.2(c) (emphasis added).

Discharges of pollutants into waters of the United States may be authorized by a National Pollutant Discharge Elimination System (NPDES) permit issued pursuant to Section 402 of the CWA. 33 U.S.C. 1342. See *EPA* v. *California ex rel. State Water Resources Control Bd.*, 426 U.S. 200, 205 (1976). NPDES permits may be issued either as "individual permits," to individual point source dischargers, or as "general permits," applicable to groups of point

sources involving the same or substantially similar types of operations. 40 C.F.R. 122.28. Whether individual or general, an NPDES permit may be challenged by any interested person in the appropriate court of appeals, within 120 days of issuance. 33 U.S.C. 1369(b)(1)(F).

Under Section 309 of the Act, when the EPA[1] discovers a violation, it may (i) issue an administrative order requiring compliance, 33 U.S.C. 1319(a)(3); (ii) initiate a civil action in a United States district court for appropriate relief, including a permanent or temporary injunction or monetary penalties, 33 U.S.C. 1319(b); or (iii) assess administrative penalties after an agency hearing, 33 U.S.C. 1319(g).[2]

A compliance order issued under Section 309(a)(3), 33 U.S.C. 1319(a)(3), is a document served on the discharger, which describes the nature of the violation and demands adherence to the requirements of the Act, sometimes including the initiation of remedial measures. The compliance order is not self-executing, however. To compel performance, the EPA must seek injunctive relief in district court, under Section 309(b), 33 U.S.C. 1319(b); to exact monetary penalties for noncompliance, the agency must either bring suit in district court under Section 309(b) or initiate administrative proceedings under Section 309(g), 33 U.S.C. 1319(g). Irrespective of the forum or the relief requested, the EPA has the

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[1] Enforcement of the Act is shared jointly by the EPA and the Army Corps of Engineers. See 33 U.S.C. 1319(a), (b) and (g); 33 C.F.R. 326.3(c)(1), 326.6. Because this case involves action by the EPA, for the sake of simplicity we refer only to the EPA in our description of the enforcement scheme.

[2] Violators are also subject to imprisonment and fines for criminal violations of the Act. 33 U.S.C. 1319(c).

burden of proving the statutory violation without regard to the existence of the compliance order. Consequently, issuance of a compliance order is merely an optional preliminary step in a process that may (depending on the agency's exercise of its prosecutorial discretion) result—after notice and opportunity for a hearing—in an injunction or in the assessment of a civil penalty.[3]

2. Petitioner was engaged in the business of disposing of waste brine, produced during oil extraction, in Laguna Gatuna, an area of approximately 398 acres located in Lea County, New Mexico. Laguna Gatuna is subject to seasonal inundation and is fed by a natural spring. No streams flow into or out of it. Pet. App. 2, 11-14.

In July 1987, petitioner's corporate predecessor wrote to the EPA, providing certain information in support of its request for confirmation that Laguna Gatuna was not "waters of the United States" within the purview of the CWA. Pet. App. 13; Pet. C.A. App. 120. The EPA replied (Pet. C.A. App. 120) as follows:

> Based on the information you submitted, EPA would not consider the referenced playa lake to be "waters of the United States" as that term is defined at 40 C.F.R. § 122.2. Playa lakes may be

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[3] If the EPA elects to seek an administrative penalty under Section 309(g), the agency must provide written notice to the discharger and afford the discharger 30 days to request a hearing on a proposed penalty order. 33 U.S.C. 1319(g)(2). Depending on the size of a proposed penalty, the hearings may be required to be held pursuant to the adjudicatory procedures of the Administrative Procedure Act, 5 U.S.C. 554. See 33 U.S.C. 1319(g)(2); 40 C.F.R. Pt. 22. The EPA's assessment of a civil penalty is expressly subject to judicial review. 33 U.S.C. 1319(g)(8).

> considered "waters of the United States" if they "would affect or could affect interstate or foreign commerce." You indicate in your letter that there are no recreational, industrial, or other uses that could affect interstate commerce, and that the playa lake is not hydrologically connected to "waters of the United States." Based on this understanding of the facts, EPA agrees that Laguna Gatuna would not be considered "waters of the United States."

On February 25, 1991, EPA Region VI issued a general NPDES permit applicable to certain facilities in New Mexico engaged in onshore oil and gas extraction, which contained a "no discharge" limitation for "produced water," including waste brine. 56 Fed. Reg. 7698, 7704 (1991). The general permit was subject to judicial review for 120 days after issuance (until June 25, 1991), pursuant to Section 509(b)(1)(F) of the CWA, 33 U.S.C. 1369(b)(1)(F).

In the spring of 1991, while the opportunity to challenge the general permit was still pending, the EPA notified petitioner that it now believed that Laguna Gatuna was "waters of the United States" subject to the EPA's jurisdiction under the CWA, based on new indications of Laguna Gatuna's use by migratory birds. Pet. App. 13-14. Thereafter, petitioner met with the EPA to provide the agency with information relating to petitioner's belief that Laguna Gatuna was not "waters of the United States" within the meaning of the Act. *Ibid.*

On May 22, 1992, after further study, the EPA issued a compliance order, under Section 309(a)(3), directing petitioner to cease discharging pollutants into Laguna Gatuna. Pet. App. 3, 14; Pet. C.A. App.

54-58. The order stated that Laguna Gatuna provided a nesting, feeding, and resting area for migratory birds, that the area was capable of receiving discharges by industries engaged in interstate commerce, and, therefore, that Laguna Gatuna was "waters of the United States." *Id.* at 56. The order notified petitioner that its disposal activities were not authorized by the terms of the general permit for discharges in New Mexico and, consequently, that its discharges into Laguna Gatuna violated Section 301(a) of the Act. Pet. C.A. App. 57.

Petitioner ceased dumping waste brine into Laguna Gatuna and met again with the EPA, to provide the agency with further information relating to petitioner's belief that Laguna Gatuna was not "waters of the United States." Pet. App. 14-15. The EPA did not, however, alter its determination or withdraw its order. Since then, petitioner has not discharged waste into Laguna Gatuna, and the EPA has taken no further action against petitioner.

3. In June 1993, petitioner filed an action for declaratory relief in the United States District Court for the District of New Mexico (Pet. App. 10-23), claiming that the EPA lacked jurisdiction over Laguna Gatuna, because (in petitioner's view) it was not "waters of the United States," and asserting that the EPA's issuance of the compliance order violated petitioner's due process rights, primarily because the CWA and its implementing regulations provide petitioner no way to challenge the EPA's determinations short of violating the order and thereby running the risk of a substantial penalty. Pet. App. 3, Pet. App. 19-21.

The district court granted the EPA's motion to dismiss the complaint for lack of jurisdiction, agreeing

that review of the agency's compliance orders is precluded by the CWA. Pet. App. 8 (citing *Rueth* v. *EPA*, 13 F.3d 227 (7th Cir. 1993); *Southern Pines Assocs.* v. *United States*, 912 F.2d 713 (4th Cir. 1990); *Hoffman Group, Inc.* v. *EPA*, 902 F.2d 567 (7th Cir. 1990); and *Howell* v. *United States Army Corps of Engineers*, 794 F. Supp. 1072 (D.N.M. 1992)).

The court of appeals affirmed. Pet. App. 1-7. After surveying the cases cited by the district court, and looking in addition to *Southern Ohio Coal Co.* v. *Office of Surface Mining, Recalamation & Enforcement*, 20 F.3d 1418 (6th Cir.), cert. denied, 115 S. Ct. 316 (1994), the court found "no reason to disagree" with the decisions of the Fourth, Sixth, and Seventh Circuits that judicial review is precluded by the CWA and that the Act's bar on pre-enforcement review does not violate due process. Pet. App. 6.

ARGUMENT

1. Petitioner argues (Pet. 11-19) that an EPA compliance order is subject to judicial review before, and in the absence of, any attempt by the EPA to enjoin the alleged violation or to assess civil penalties on account of it. The court of appeals, however, correctly concluded that the CWA precludes review of the EPA's compliance orders. That decision follows from the teachings of this Court and is consistent with the decisions of every other court of appeals that has considered the matter. There is accordingly no warrant for further review.

a. Although Congress is presumed to have intended judicial review of final agency action, *Abbott Lab.* v. *Gardner*, 387 U.S. 136, 140 (1967), review is not available where it has been specifically precluded by statute. 5 U.S.C. 701(a)(1); see *United States* v.

Fausto, 484 U.S. 439, 452 (1988) (The "presumption favoring judicial review is not to be applied in the 'strict evidentiary sense,' but may be 'overcom[e] whenever the congressional intent to preclude review is "fairly discernible in the statutory scheme."'"), quoting *Block* v. *Community Nutrition Inst.*, 467 U.S. 340, 351 (1984). Whether a particular statute (here, the CWA) "is intended to preclude initial judicial review is determined from the statute's language, structure, and purpose, [and] its legislative history." *Thunder Basin Coal Co.* v. *Reich*, 114 S. Ct. 771, 776 (1994).

In *Block*, this Court held that the Agricultural Marketing Agreement Act of 1937 implicitly precluded APA review of agency milk marketing orders at the behest of consumers. That Act incorporated an elaborate scheme of administrative and judicial review that did not involve consumers, and the Court found that permitting suits by consumers "would severely disrupt" the statutory scheme. 467 U.S. at 348.

In *Fausto*, the Court concluded that the Civil Service Reform Act of 1978 implicitly precluded review of certain adverse federal personnel actions that were not made expressly reviewable under that Act. In *Fausto*, as in *Block*, the Court's determination regarding Congress's intent to preclude review was based on "inferences of intent" drawn from the structure of the statute as a whole. 484 U.S. at 452.

Recently, in *Thunder Basin Coal Co.*, the Court examined the provisions of the Federal Mine Safety and Health Amendments Act of 1977, which provided expressly for review of Mine Safety and Health Administration (MSHA) citations. Under the statutory scheme, such citations were to be challenged

first before the Federal Mine Safety and Health Review Commission and then before the courts of appeals. 114 S. Ct. at 776-777. The Court held that Congress's express provisions for review of MSHA citations precluded by implication review of the MSHA's pre-citation determinations, as to which the statute was "facially silent." *Id.* at 777.

b. The structure of the CWA's enforcement scheme likewise demonstrates Congress's intention to preclude review of Section 309(a)(3) compliance orders. As we have explained, when the EPA finds that a person is in violation of the CWA, the agency is authorized to take action to remedy the situation. 33 U.S.C. 1319(a)(3). Congress provided the EPA with the flexibility to respond to such violations in a number of alternative and complementary ways. The agency is authorized immediately to initiate a civil enforcement action in district court (under Section 309(b)) or to institute administrative proceedings to assess civil penalties (under Section 309(g)). It may, however, choose initially to take the lesser step of issuing an ex parte order (under Section 309(a)(3)) notifying the discharger of the violation and demanding compliance. That option is distinguished both by the absence of any punitive sanction and by the expeditious fashion in which it can be employed: A compliance order can protect the environment from violations of the Act promptly and at minimal transaction cost to the agency, the courts, and the regulated parties. "[P]re-enforcement review of compliance orders would," however, "render that option a meaningless alternative to bringing a civil enforcement action at the outset, and effectively eliminate the compliance order as a means of expeditiously abating violations of the CWA without resort to

judicial process. It is doubtful Congress intended such a result." *Hoffman Group Inc.* v. *EPA*, 29 Env't Rep. Cas. (BNA) 1180, 1182 (N.D. Ill. 1989), aff'd, 902 F.2d 567 (7th Cir. 1990).

The Act's specific and detailed provision for judicial involvement in the EPA's enforcement proceedings also evidences Congress's intention that the courts refrain from pre-enforcement review. Under Section 309(a)(3), (b), and (d), upon the agency's initiation of a judicial action, the district court may adjudicate an alleged violation of the CWA in the first instance, order appropriate injunctive relief, and/or assess civil penalties. Under Section 309(g)(8), when the EPA assesses a penalty through its own administrative enforcement proceedings, the resulting enforcement order is reviewable in a district court or a court of appeals (depending on the size of the penalty) at the behest of the person assessed. 33 U.S.C. 1319(g)(8). The agency's enforcement order may not be set aside on judicial review "unless there is not substantial evidence in the record, taken as a whole, to support the finding of a violation or unless the [agency's] assessment of the penalty constitutes an abuse of discretion." *Ibid.* The CWA thus delineates carefully the occasions when (and the manner in which) the courts may intervene; the issuance of a compliance order under Section 309(a)(3) is not one of those occasions. Consistent with this Court's teachings, see *Thunder Basin Coal Co.*, 114 U.S. at 777; *Fausto*, 484 U.S. at 447-449; *Block*, 467 U.S. at 345-348; *United States* v. *Erika, Inc.*, 456 U.S. 201, 208 (1982), the CWA's express provision for judicial involvement in the EPA's enforcement actions suggests by negative implication that review of the agency's pre-enforcement determinations is precluded. *Southern*

Ohio Coal Co., 20 F.3d at 1426; *Hoffman Group*, 902 F.2d at 569-570; *Howell*, 794 F. Supp. at 1074.

The legislative history of the CWA provides further support for that conclusion. The CWA's enforcement provisions were modeled on those in the Clean Air Act (CAA), 42 U.S.C. 7401 *et seq.*,[4] which also authorize the EPA to respond to a violation either by bringing an enforcement suit in district court or by issuing an administrative compliance order. 42 U.S.C. 7413(a)(1) and (b). Cases under the CAA have consistently held that Congress intended to preclude pre-enforcement judicial review of EPA compliance orders issued under that Act. See, *e.g.*, *West Penn Power Co.* v. *Train*, 522 F.2d 302, 311 (3d Cir. 1975), cert. denied, 426 U.S. 947 (1976); *Union Electric Co.* v. *EPA*, 593 F.2d 299, 304 (8th Cir.), cert. denied, 444 U.S. 839 (1979); *Lloyd A. Fry Roofing Co.* v. *EPA*, 554 F.2d 885, 889-891 (8th Cir. 1977); cf. *Pacificorp* v. *Thomas*, 883 F.2d 661 (9th Cir. 1988) (compliance order issued under CAA not final agency action).[5] Given the common derivation of the statutes'

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[4] The enforcement provisions of the CAA were codified in 1970. Clean Air Amendments of 1970, Pub. L. No. 91-604, § 4(a), 84 Stat. 1686-1687. The similar provisions of the CWA were adopted in 1972. Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, § 2, 86 Stat. 859-860. The Senate committee report that proposed the new enforcement section of the CWA explained that it "drew extensively upon the provisions" of the 1970 CAA amendments. S. Rep. No. 414, 92d Cong., 1st Sess. 63 (1971).

[5] Several courts reached a similar result, later codified by Congress, under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. 9601 *et seq.* See, *e.g.*, *Wagner Seed Co.* v. *Daggett*, 800 F.2d 310, 315 (2d Cir. 1986); *Wheaton Indus.* v. *EPA*, 781 F.2d 354, 356-357 (3d Cir. 1986); *United States* v. *Outboard Marine Corp.*, 789 F.2d 497,

enforcement schemes, those decisions under the CAA strongly suggest that there is no pre-enforcement review of compliance orders issued under the CWA. *Southern Ohio Coal Co.*, 20 F.3d at 1426; *Southern Pines Assocs.*, 912 F.2d at 716.

c. The lower courts have consistently concluded, from the language, structure, and history of the CWA, that the Act precludes judicial review of Section 309(a)(3) compliance orders. See, *e.g.*, *Southern Ohio Coal Co.*, 20 F.3d at 1426-1428; *Rueth*, 13 F.3d at 230; *Southern Pines Assocs.*, 912 F.2d at 715-716 (4th Cir. 1990); *Hoffman Group*, 902 F.2d at 569; *Child* v. *United States*, 851 F. Supp. 1527, 1533 (D. Utah 1994); *Salt Pond Assocs.* v. *United States Army Corps of Engineers*, 815 F. Supp. 766, 771 n.16 (D. Del. 1993); *Board of Managers* v. *Bornhoft*, 812 F. Supp. 1012, 1014 (D.N.D. 1993), aff'd, 48 F.3d 1223 (8th Cir. 1995) (Table); *Howell*, 794 F. Supp. at 1074; *Leslie Salt Co.* v. *United States*, 789 F. Supp. 1030, 1033-1034 (N.D. Cal. 1991); *Route 26 Land Dev. Ass'n* v. *United States*, 753 F. Supp. 532, 540 (D. Del. 1990), aff'd, 961 F.2d 1568 (3d Cir. 1992) (Table); *McGown* v. *United States*, 747 F. Supp. 539, 541-542 (E.D. Mo. 1990); *Fiscella & Fiscella* v. *United States*, 717 F. Supp. 1143, 1147 (E.D. Va. 1989).

d. Nothing in this Court's decision in *Thunder Basin Coal Co.* argues to the contrary. The Court suggested in that case that a statute might more readily be interpreted to permit pre-enforcement review if in the absence of early judicial involve-

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505-506 (7th Cir.), cert. denied, 479 U.S. 961 (1986); *J.V. Peters & Co.* v. *Administrator, EPA*, 767 F.2d 263, 264-265 (6th Cir. 1985); *Barnes* v. *United States District Court*, 800 F.2d 822 (9th Cir. 1986).

ment the complainant would have no opportunity for "meaningful review." 114 S. Ct. at 776. At issue there was a letter from the MSHA instructing a coal company to post the employees' designation of mine representatives pursuant to 30 U.S.C. 813(f). This Court concluded that, if the company chose not to comply and the agency initiated enforcement proceedings, the company's statutory and constitutional claims could "be meaningfully addressed" in the agency's proceedings and, on review, in the court of appeals. 114 S. Ct. at 779-780 & n.20.

Like the MSHA letter in *Thunder Basin Coal Co.*, the EPA compliance order at issue here is not self-enforcing. It imposes no penalty or other sanction. The issuance of such a compliance order does nothing to alter the legal position of the alleged violator. As the Fourth Circuit has explained:

> A compliance order is a document served on the violator, setting forth the nature of the violation and specifying a time for compliance with the Act. 33 U.S.C. § 1319(a)(5)(A). If a violator fails to abide by that order, EPA may seek to enforce the order by bringing a suit in federal district court under section 309(b) of the Act, 33 U.S.C. 1319(b). However, EPA need not issue a compliance order before bringing an action. The penalties for violating either the Act or a compliance order are the same. * * * The violator is subject to the same injunction and penalties whether or not EPA has issued a compliance order.

Southern Pines Assocs., 912 F.2d at 715-716. In effect, the compliance order merely apprises the alleged violator of the agency's pre-enforcement position. Its issuance is by no means a final administrative

determination that a violation has occurred.[6] If the EPA later "seeks judicial or administrative enforcement of penalties against [the alleged violator], then [it] will be entitled to [its] day in Court." *Rueth*, 13 F.3d at 230.[7]

2. Petitioner argues (Pet. 7-10) that the preclusion of review of the compliance order effected a deprivation of due process, because the consequences of disobeying the order are potentially so overwhelming that petitioner cannot realistically afford to disobey its mandate and test its legality in later enforcement proceedings. That contention is without merit.

In *Thunder Basin Coal Co.*, this Court acknowledged that the Mine Safety and Health Act's mandatory civil penalties "unquestionably may become onerous if petitioner chooses not to comply" with the agency's interpretation, but concluded that the petitioner would face no constitutional deprivation if it chose not to comply, because the Act's civil penalties "become final and payable only after full review by both the [Mine Safety and Health Review]

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[6] Indeed, because a compliance order does not "impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process," *Chicago & Southern Air Lines, Inc.* v. *Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948), several lower courts have concluded (correctly, in our view) that issuance of a compliance order is not "final agency action" for purposes of APA review. See, *e.g.*, *Child*, 851 F. Supp. at 1535; *Howell*, 794 F. Supp. at 1075; *Leslie Salt Co.*, 789 F. Supp. at 1033-1034; *Route 26 Land Dev. Ass'n*, 753 F. Supp. at 540.

[7] Because petitioner will have the unquestioned right to judicial review of any enforcement action, "this case does not implicate 'the strong presumption that Congress did not mean to prohibit all judicial review.'" *Thunder Basin Coal Co.*, 114 S. Ct. at 776 n.8.

Commission and the appropriate Court of Appeals." 114 S. Ct. at 781-782. See also *Board of Governors of Federal Reserve System* v. *MCorp Fin., Inc.*, 502 U.S. 32, 43-44 (1991) ("If and when the Board finds that MCorp has violated that regulation, MCorp will have, in the Court of Appeals, an unquestioned right to review of both the regulation and its application."). The very same reasoning applies here. See *Southern Pines Assocs.*, 912 F.2d at 717; *Hoffman Group*, 902 F.2d at 568-569.[8]

The absence of initial judicial review may offend due process in extreme cases where "the practical effect of coercive penalties [is] to foreclose all access to the courts." *Thunder Basin Coal Co.*, 114 S. Ct. at 782 (citing *Ex parte Young*, 209 U.S. 123, 148 (1908)). The CWA's enforcement scheme does not present

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[8] Contrary to petitioner's assertions, the analysis in this case does not differ simply because petitioner has chosen to characterize its complaint as a challenge to the EPA's jurisdiction, rather than a challenge to the EPA's application of the Act. "[T]here is no discernible line between an agency's exceeding its authority and an agency's exceeding authorized application of its authority. To exceed authorized application is to exceed authority. Virtually any administrative action can be characterized as either the one or the other, depending upon how generally one wishes to describe the 'authority.'" *Mississippi Power & Light Co.* v. *Mississippi ex rel. Moore*, 487 U.S. 354, 381 (1988) (Scalia, J., concurring in the judgment). To the extent that there may be rare circumstances in which an agency "completely overextend[s] [its] authority," thereby necessitating judicial review, *Rueth*, 13 F.3d at 231, the EPA's issuance of the compliance order in this case, upon its determination that Laguna Gatuna constitutes "waters of the United States," was an action well within the scope of the EPA's statutory authority, irrespective of whether its determination was correct. See *Southern Ohio Coal Co.*, 20 F.3d at 1427-1428.

such a case, however, because it does not threaten such overwhelming and severe penalties as to cut off all access to the courts.

Although some penalty is required under the Act upon the finding of a violation, the amount of that penalty is subject to guided discretion. *Leslie Salt Co.* v. *United States*, 55 F.3d 1388, 1396-1397 (9th Cir.), cert. denied, 116 S. Ct. 407 (1995); *Atlantic States Legal Found., Inc.* v. *Tyson Foods, Inc.*, 897 F.2d 1128, 1142 (11th Cir. 1990); *Stoddard* v. *Western Carolina Regional Sewer Auth.*, 784 F.2d 1200, 1208 (4th Cir. 1986). Section 309(d) of the Act directs the district courts, in determining the amount of a civil penalty, to consider

> the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require.

33 U.S.C. 1319(d). Section 309(g)(3) similarly directs the EPA, in administrative proceedings, to take into account

> the nature, circumstances, extent and gravity of the violation, or violations, and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require.

33 U.S.C. 1319(g)(3). The common directive to consider "such other matters as justice may require"

affords the courts sufficient leeway to alleviate any due process concerns. See *Leslie Salt Co.*, 55 F.3d at 1397.[9]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[9] Cf. *Wagner Seed Co.*, 800 F.2d at 316 (notwithstanding potential treble liability for refusal to comply with order for hazardous waste cleanup, due process is satisfied by judicial discretion over imposition of penalties); accord *Solid State Circuits, Inc.* v. *EPA*, 812 F.2d 383, 389-390 (8th Cir. 1987).